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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 134.—October Term, 1920.

THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, *Appellant*,
vs.
THE UNITED STATES.
} Appeal from the Court of Claims.

REPLY BRIEF FOR APPELLANT.

WILLIAM R. HARR,
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Attorneys for the Oregon-Washington Railroad & Navigation Company.



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Counsel for the Government has seen fit on this appeal to question the correctness of the Court of Claims decision in the case of the *Chicago, Milwaukee & St. Paul Railway Company*, decided February 8, 1915, holding that the transportation of household goods and other personal property of Army officers and other Government officials changing station was not subject to land-grant deductions, although no question was made below by the Department of Justice as to the correctness of that decision, and although that decision has uniformly been followed by the Court of Claims, as well as by the accounting officers of the Treasury since the Act of Congress of August 29, 1916 (39 Stat. 619, 634), providing that the restrictive provisions of the Army Appropriation Acts should *not* be construed (as they had been construed by the

Comptroller of the Treasury after the *Chicago, Milwaukee & St. Paul* case was decided by the Court of Claims) "to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant Acts."

The acquiescence of all branches of the Government in the decision of the Court of Claims in the *Chicago, Milwaukee & St. Paul* case, was doubtless due to the fact that the uniform construction placed upon the railroad land-grant and Army Appropriation Acts has been that said Acts (construed together, as they must be) only required reduced rates to be given for the transportation of "property of the United States."

It will be observed that all the earlier and by far the more numerous class of railroad land-grant Acts provided that—

> "Said railroad shall be and remain a public highway for the use of the Government of the United States, free from toll or other charges upon the transportation of any *property or troops of the United States.*"

Act March 3, 1863 (12 Stat. 772), Atchison, Topeka & Santa Fe Railroad. (From Atchison, Kans., to State Line.)

Act March 3, 1863 (12 Stat. 772), Atchison, Topeka & Santa Fe Railroad. (From Lawrence, Kans., to southern boundary of Kansas.)

Act May 15, 1856 (11 Stat. 9), Chicago, Burlington & Quincy Railroad. (From Burlington, Iowa, to Missouri, Mo.)

Acts March 3, 1867, and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Chicago, Milwaukee & St. Paul Railway. (From St. Paul, via Mendota, to Lyle, Minn.)

Act May 12, 1864 (13 Stat. 72), Chicago, Milwaukee & St. Paul Railway. (From Calmar, Iowa, to Sheldon, Iowa.)

Acts March 3, 1857, and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Chicago, Milwaukee & St. Paul Railway. (From Mississippi River (La Crescent) to Houston, Minn.)

Act May 15, 1856 (11 Stat. 9), Chicago & Northwestern Railway. (From Cedar Rapids, Iowa, to Transfer Grounds, Union Pacific Railway, and Branch, Lyons to Clinton, Iowa.)

Acts March 3, 1857 and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Chicago & Northwestern Railway. (From Winona, Minn., to a point on the Big Sioux River, six-tenths of a mile west of Watertown, Station.)

Act June 3, 1856 (11 Stat. 20), Chicago & Northwestern Railway. (From Fond du Lac, Wis., to Junction with Duluth, South Shore & Atlantic R. R.)

Act May 15, 1856 (11 Stat. 9), Chicago, Rock Island & Pacific Railway. (From Davenport, Iowa, to Transfer Grounds, U. P. R. R.)

Act June 3, 1856 (11 Stat. 20), Chicago, St. Paul, Minneapolis & Omaha Railway. (From 12.3 miles south of Warrens, Wis., to St. Paul, Minn., and Branch from Stillwater Junction, Minn., to Stillwater, Minn.)

Act March 3, 1857 (11 Stat. 195), Chicago, St. Paul, Minneapolis & Omaha Railway. (From St. Paul, Minn., via Le Mars, to Sioux City, Iowa.)

Act June 3, 1856 (11 Stat. 20), Chicago, St. Paul, Minneapolis & Omaha Railway. (From Hudson, Wis., to Superior, Wis., and Branch from Superior Junction, Wis., to Bayfield, Wis.)

Act June 3, 1856 (11 Stat. 21), Duluth, South Shore & Atlantic Railway. (From Marquette, Mich., to Ontonagon, Mich.)

Act June 3, 1856 (11 Stat. 17), East Tenn., Va. & Georgia and Queen & Crescent System. (From Wauhatchie, Tenn., to Meridian, Miss.)

Act August 11, 1856 (11 Stat. 30), East Tenn., Va. & Georgia and Queen & Crescent System. (From Jackson, Miss., to Meridian, Miss.)

Act June 30, 1856 (11 Stat. 18), East Tenn., Va. & Georgia and Queen & Crescent System. (From Delta, La., opposite Vicksburg, Miss., to Shreveport, La.)

Act June 3, 1856 (11 Stat. 17), East Tenn., Va. & Georgia and Queen & Crescent System. (From Selma, Ala., to Jacksonville, Ala.)

Act June 3, 1856 (11 Stat. 21), Flint & Pere Marquette Railroad. (From Flint, Mich., to Ludington, Mich.)

Act May 17, 1856 (11 Stat. 15), Florida Central & Peninsular Railroad Company. (From Fernandina, Fla., to Tampa Bay, and Branch Waldo, Fla., to Cedar Key, Fla.)

Act May 17, 1856 (11 Stat. 15), Florida Central & Peninsular Railroad Company. (From Jacksonville, Fla., to Chattahoochee, on the Apalachicola River, Fla.)

Act June 3, 1856 (11 Stat. 21), Grand Rapids & Indiana Railroad. (From Fort Wayne, Ind., to Petoskey, Mich.)

Acts March 3, 1857 and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Great Northern Rail-

way Line. (From St. Paul, Minn., to Breckenridge, Minn.)

Acts March 3, 1857, and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Great Northern Railway Line. (From St. Paul, Minn., to St. Vincent, Minn.)

Act June 10, 1852 (10 Stat. 8), Hannibal & St. Joseph Railroad. (From Hannibal, Mo., to St. Joseph, Mo.)

Act Sept. 20, 1850 (9 Stat. 466), Illinois Central Railroad. (From Cairo, Ill., to Chicago, Ill.)

Act Sept. 20, 1850 (9 Stat. 466), Illinois Central Railroad. (From Centralia, Ill., to Dunleith (now East Dubuque, Ill.))

Act May 15, 1856 (11 Stat. 9), Illinois Central Railroad. (From Dubuque, Iowa, to Sioux City, Iowa.)

Act June 3, 1856 (11 Stat. 21), Lake Shore & Michigan Southern Railway. (From Jonesville, Mich., to Lansing, Mich.)

Acts June 3, 1856 and May 17, 1856 (11 Stat. 17 and 11 Stat. 15), Louisville & Nashville Railroad. (From Decatur, Ala., to Flomaton, Ala.)

Act May 17, 1856 (11 Stat. 15), Louisville & Nashville Railroad. (From Flomaton, Ala., to Pensacola and River Junction, Fla.)

Act June 10, 1852 (10 Stat. 8), Missouri Pacific Railroad—Main Line. (From St. Louis, Mo., to Pacific, Mo.)

Act June 3, 1856 (11 Stat. 17), Mobile & Girard Railroad. (From Girard, Ala., to Troy, Ala.)

Act Sept. 20, 1850 (9 Stat. 466), Mobile & Ohio Railroad. (From Mobile, Ala., to Cairo, Ill.)

Acts March 3, 1857 and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Northern Pacific Rail-

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Act Sept. 20, 1850 (9 Stat. 466), Mobile & Ohio Railroad. (From Mobile, Ala., to Cairo, Ill.)

Acts March 3, 1857 and March 3, 1865 (11 Stat. 195 and 13 Stat. 526), Northern Pacific Rail-

road. (From Watab, Minn., to Brainerd, Minn.)

Act June 3, 1856 (11 Stat. 18), Southern Pacific Company, formerly Morgan's Louisiana & Texas Railroad. (From New Orleans, La., to Morgan City, La.)

Act June 10, 1852 (10 Stat. 8), St. Louis & San Francisco Railway. (From Pacific, Mo., to Seneca, Mo.)

Acts March 3, 1857, May 15, 1864, and March 3, 1865 (11 Stat. 195, 13 Stat. 64 and 13 Stat. 526), St. Paul & Duluth Railroad. (From St. Paul, Minn., to Duluth, Minn., and from White Bear Lake, Minn., to Stillwater, Minn.)

Act June 3, 1856 (11 Stat. 18), Texas & Pacific Railway. (From Shreveport, La., to Texas State Line, near Waskom, Texas.)

Act May 5, 1864 (13 Stat. 66), Wisconsin Central Railway. (From Portage City, Wis., to Ashland, Wis.)

The absolutely "free" land-grant Acts also used similar language, *i. e.*, they require free transportation only of "property and troops of the United States."

Act July 25, 1866, sec. 5, 14 Stat. 239, Southern Pacific Co. (From junction with Central Pacific Railroad to northern boundary of California.)

Act July 28, 1866, sec. 1, 14 Stat. 338, Little Rock & Fort Smith Railway, Little Rock & Memphis Railway, and Missouri Pacific Railway.

As to the first class of land-grant railroads, it is clear that the Government has no right to require the transportation of private property of Army officers and other Government officials at land-grant rates.

Nor are we, in this case, considering the transportation of troops, but the transportation of the household goods and other private property of Army officers, and other Government officials, on permanent change of station, under regulations of the War Department or other Government officers, which authorize the transportation of from 6,000 pounds (3 tons) for a captain to 15,000 pounds (7½ tons) for a general. Clearly this is not transportation of "property . . . of the United States."

The other and very limited class of "fifty per cent" railroad land-grant Acts, such as that quoted in the Brief for the Government in the *Western Pacific* case (No. 136, now pending here), provide that the railroad—

> "shall be a post route and a military road, subject to the use of the United States for postal, military, naval and other Government service, and also subject to such regulations as Congress may impose restricting the charges for such *Government* transportation."

The only Acts of this last-mentioned class were:

> Act of July 2, 1864, 13 Stat. 365, relating to Northern Pacific Railroad, and Act of July 27, 1866, 14 Stat. 292, relating to Atlantic and Pacific Railroad and Southern Pacific Railroad in Southern part of California.

See Circular No. 16, Quartermaster General's Office, 1912, entitled "Schedule of Land-Grant and Bond-Aided Railroads of United States", cited in footnote to opinion of this court in *Union Pacific R. R. Co.* v. *United States*, 249 U. S. 354. Mr. Justice Brandeis,

in delivering the opinion of the court in that case, after referring to this circular and the Act of September 20, 1850, 9 Stat. 466, 467 (one of the numerous Acts using the expression "property or troops of the United States"), says that "A few of the Acts granting lands in aid of railroads provided that the grant is 'subject to such regulations as Congress may impose restricting the charges for . . . Government transportation.' "

In pursuance of the authority reserved in said last-mentioned class of Acts, Congress, beginning with the Army Appropriation Act of February 24, 1891 (26 Stat. 775-776), provided that railroads of said class "having claims against the United States for the transportation of troops and munitions of war and military supplies and property, should be paid not exceeding sixty per centum of the rates paid by private parties" for such Government transportation.

In the same paragraph of said Act, Congress had previously provided that the first class of railroads should receive in payment for "Army transportation lawfully due" such railroads (to be adjusted in accordance with the decisions of this court in certain land-grant cases) not to exceed fifty per centum of the full amount of the services paid.

The uniform construction put by the several Departments of the Government upon these and similar provisions in the Annual Army Appropriation Acts has been that they both referred only to the transportation of "property of the United States", no distinction ever having been made or attempted to be made between said two classes of land-grant Acts in this respect.

(It will be noted that the difference in the amount of deduction required by the Act of 1891 for the two

classes of land-grant roads was immediately eliminated in the next succeeding Army Appropriation Act, indicating that this discrimination was probably due to an inadvertence.)

The only question that has been made in the application of both of said groups of Acts to Government transportation is as to whether the aforesaid restrictions in the Army Appropriation Acts as to the second class of land-grant roads were not intended to be limited to transportation of property of the United States *for the Army*, but the Comptroller of the Treasury took the view that transportation of *property of the United States* for any other Department was included, a question which the Comptroller admitted, however, was not free from doubt. (It will be observed that the provisions of said Acts as to the first class of land-grant railroads only applied, in terms, to "Army transportation" over said roads.)

The attitude of the Comptroller of the Treasury in regard to the restrictions imposed by Congress upon the second class of land-grant roads appears in his decisions of June 24, 1897, 3 Comp. Dec. 724, and January 17, 1917, 23 Comp. Dec. 395. In the headnote to the former case it is stated (3 Comp. Dec. 724, italics ours):

> "The grant of land to the Northern Pacific Railroad Company having been made subject to such regulations as Congress may impose restricting the charges for Government transportation, and the only regulation heretofore made being with reference to persons in the military service *and to property of the United States*, said company is entitled to the regular tariff charges for the transportation of civilian employees of the Government in the Indian service."

In the second decision above cited the Comptroller, after referring to the provisions of the Northern Pacific land-grant act, said (23 Comp. Dec. 397, italics ours):

> "A restriction as to the basis of payment for Government transportation over roads subject to the aforesaid condition was made in the Army appropriation act of February 24, 1891 (26 Stat. 776), and continued since that time, the basis of payment being fixed at 50 per cent of tariff rates by the act of July 16, 1892 (27 Stat. 180), thus making the same basis of payment as applied to the other land grant roads for which payment for *Government transportation* is made under appropriations by Congress in accordance with the decisions of the Supreme Court.
>
> "In a decision of this office of May 12, 1904 (29 MS. Comp. Dec. 555), the then Comptroller, in construing a similar case, said:
>
> " 'Soon after the passage of the first acts above cited (February 24, 1891, 26 Stat. 776), restricting the charges for Government transportation over the class of roads indicated, the question whether the restriction applied to the charges for the transportation of *Government property* payable from other appropriations than "Transportation of the Army" was duly considered by both the First and Second Comptrollers. The question was admitted to be not free from doubt, but both of said officials held that the restriction was applicable to the transportation of *all Government property* regardless of the appropriation chargeable therewith. See decision of First Comptroller, dated June 1, 1893 (MS. Dec., First Comp. v. 13, p. 296) and decisions of Second Comptroller, March 14, 1893 (MS. Dec., Second Comp., v. 61, p. 184) and October 26, 1893 (id. v. 62, p. 170).

"'Since the rendition of the decisions referred to, it has been the practice of the accounting officers to consider the restrictions referred to as applicable to the transportation of *all Government property*, and the railroads have acquiesced therein. The practice has been affirmed by this office. See decisions of June 24, 1897 (3 Comp. Dec. 724); April 16, 1898 (MS. Dec., vol. 6, p. 640), and April 26, 1898 (id. p. 688).'"

It was because of the aforesaid long-continued and practical construction of these land-grant and Army Appropriation Acts that the Comptroller held that the household goods and other personal property of Army officers, within the regulation change of station allowance, was "*quasi-public property*" (11 Comp. Dec. 174, decision of Oct. 13, 1904). If *private* property shipped by the Government (because of the interest it had therein) was entitled to transportation at reduced rates under said railroad land-grant and Army Appropriation Acts or any of them, then the Comptroller would not have had to hold that private property within the regulation change of station allowance was quasi-public property. So, too, if private property generally of public officials could be shipped by the Government at land-grant rates, private property of Army officers in excess of the regulation change of station allowance would be entitled to such rates, but the Comptroller held otherwise (11 Comp. Dec. 174).

Further evidence of the Government's uniform and long-continued attitude in this respect appears from the form of "Government bill of lading" adopted by the Government and expressly approved by the Comptroller of the Treasury in 1907, a copy of which is contained in the Record (pp. 9-11). It will be observed that said Government bill of lading in terms

applies only to "public property," that term being used several times throughout the bill and the conditions and instructions attached thereto, except in one instance, where the expression is "Government property."

In said Government bill of lading transportation of *property of the United States* for other Departments than the War Department is covered by the following clause (Rec., p. 11):

> "7. *Public property* may be delivered by any Government officer or agent to the Quartermaster Department of the Army, which will ship the same under its regulations (23 Stat. 111)."

Remembering that the earlier and much larger class of land-grant Acts applies in express terms only to "property . . . of the United States", and that it would introduce great confusion into the administration of the land-grant laws to differentiate between the two classes, and considering the uniform construction placed by the Government upon said Acts and the provisions of the Army Appropriation Acts enacted in pursuance thereof, it would seem that there is no warrant for holding that anything other than property of the United States was ever contemplated by either class of Acts or the restrictions in the Army Appropriation Acts applicable thereto.

It is further to be observed that the expression in the Army Appropriation Act of 1891 and subsequent Acts of that character (referring to the second class of land-grant railroads) "having claims against the United States for transportation of troops and munitions of war and military supplies and property," itself implies that the property referred to was Government

property. Certainly, at least, said language is susceptible of that construction, and such, as we have seen, has been the construction uniformly given it by the Departments of the Government charged with its administration as well as by the Court of Claims in several cases, including those now before the court.

It does not follow, as Government counsel contend, that the class of transportation here in question would not be authorized by the Army Appropriation Acts if held not to be entitled to land-grant rates. The Army Appropriation Acts provide for "the transportation of the Army and its supplies", including "transportation of troops . . . and of their baggage", and the appropriations for such transportation are not made dependent upon the question whether any class of transportation is or is not subject to land-grant rates. Even transportation of baggage in excess of the regulation change of station allowance has been expressly authorized since the Act of March 27, 1910 (36 Stat. 243, 255), which provided:

> "TRANSPORTATION OF THE ARMY AND ITS SUPPLIES: For transportation of the army and its supplies, including transportation of the troops when moving either by land or water, and of their baggage, including the cost of packing and crating: *Provided*, That hereafter baggage in excess of regulation change of station allowances may be shipped with such allowances, and reimbursement collected for transportation charges on such excess; . . ."

So, also the Army Appropriation Acts cover the transportation of many persons more or less directly connected with the Army, who are not embraced in the term "troops of the United States", as used in the

railroad land-grant Acts (*Union Pacific R. R. Co.* v. *United States*, 249 U. S. 354).

If any distinction is to be made between the two classes of "fifty per cent" land-grant roads, as to the transportation of property for the Government, then this case must be remanded to the Court of Claims for further findings, as it does not appear from this record which class of land-grant roads was involved.

The other points made by counsel for the Government appear to be sufficiently answered by our main brief.

Respectfully submitted,

WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for the Oregon-Washington Railroad & Navigation Company.

January, 1921.